

-----X  
THE PEOPLE OF THE STATE OF NEW YORK :

## DECISION

Defendant.

By written Order dated March 19, 2021, this Court granted defendant [REDACTED] motion to suppress physical evidence and his post-arrest statements; this decision memorializes the Court's reasoning.

This Court held pre-trial suppression hearings on March 15th and 16th, 2021.<sup>1</sup>

## FINDINGS OF FACT

<sup>1</sup> "Hr'g Tr." shall refer to the transcript of the hearing.

4). The defendant's car, a BMW, had tinted windows and an expired temporary New Jersey license plate, both grounds for summonses under the Vehicle and Traffic Law (Hr'g Tr. 12:7–11; 14:11–15).

As all four officers approached defendant's car—two on either side of it—PO Brennan saw that defendant was the only person in the BMW (Hr'g Tr. 16:5–21). Its windows were rolled down as they neared, and PO Brennan smelled a “very strong odor of marijuana emanating from the vehicle ... I would describe it as burnt” (Hr'g Tr. 17:2–14; 20:6–8). Officer Brennan testified that in the center console he also observed a “small bottle of spray called Blunt Effects, and sitting right next to it was a torch lighter” (Hr'g Tr. 20:9–14; 46:17–47:3). Blunt Effects is a spray used as an air freshener to mask the smell of marijuana (Hr'g Tr. 22:1–17).

Defendant was asked to step out of his car and was asked to stand by its rear while the officers searched the car interior (Hr'g Tr. 20:18–21; 21:1–12). Based upon the smell of “burnt” marijuana and the Blunt Effects spray in the car, PO Brennan testified that he believed “large quantities of marijuana [] could be concealed in the vehicle” and began searching the car (Hr'g Tr. 21:13–16; 22:15–17 [“what, if any significance did you attribute to finding this Blunt Effects spray? A: That there was a quantity of marijuana in the vehicle”]). As he searched, he says he saw “small amounts of marijuana residue throughout the car, a large amount of ash on the floor and center console” (Hr'g Tr. 21:19–22).

The officers took photographs to “memorialize” their observations (Hr'g Tr. 23:3–6). Asked about People's exhibit 4, a photograph depicting a small spray bottle and a (largely) black object in what appears to be the center console of a car, PO Brennan said that “[i]t is a picture of the center console of the vehicle, where you can see the Blunt Effects spray and the lighter right next to it ... [i]t's something I observed inside the vehicle” (Hr'g Tr. 26:6–16; 27:4–10).

On this basis, the officers searched the car trunk and therein observed and then recovered a gun (Hr'g Tr. 28:1–29:5). Defendant was arrested (Hr'g Tr. 31:11–14) and both he and his car were transported to the precinct where an inventory search of the entire car, including the trunk, was conducted (Hr'g Tr. 36:2–12). While awaiting arrest processing inside the precinct cell, defendant spontaneously asked whether he was being charged with gun possession (Hr'g Tr. 43:13–17).

The version set forth above constitutes the evidence adduced on the People's direct case. The salient aspects of this rendition, however, are contradicted by PO Brennan's own BWC Videos, testimony, and paperwork.

Neither PO Brennan's nor PO Brady's BWC Video, for example, show a spray bottle or torch in the center console of the car or anywhere in the car interior. Indeed, when confronted with his own BWC video, PO Brennan admitted that it did not support his direct testimony concerning where he had observed the Blunt Effects spray (Hr'g Tr. 50:16–23; 51:20–25; 53:9–11 ["Q: Do you see any part of the spray right now? A: Based on the camera, on the body worn camera, no, I can't"]). Instead, the BWC Video shows what appears to be a pack of Newport cigarettes in the center console (Hr'g Tr. 50:4–5).

Although PO Brennan described finding "a large amount of ash" (Hr'g Tr. 24:6–16), the BWC videos and the People's exhibits show negligible bits of ash along the driver's side edge of the car floor and possibly in the small well of the driver's side door (People's exhibits 2, 3). Officer Brennan characterized these traces of ash as marijuana residue (Hr'g Tr. 27:20–23) but admitted that he was never trained to distinguish cigarette from marijuana ashes (Hr'g Tr. 58:3–5). He also averred that "the only residue that was able to be vouchered was the residue that was in the fanny pack in the trunk" (Hr'g Tr. 57:16–17).



Officer Brennan's testimony on cross-examination further undermined his direct testimony. Inconsistent with his testimony that he smelled a burning odor of marijuana from the car, he also testified that defendant bore no indicia of being under the influence of marijuana (Hr'g Tr. 59:21–60:12). Defendant was not observed to be smoking anything, let alone marijuana, nor seeking to rid himself of any evidence of marijuana (Hr'g Tr. 47:23–48:3). He was not observed using the Blunt Effects spray (Hr'g Tr. 57:2–4). The charges against defendant do not include operating a motor vehicle while under the influence of alcohol or drugs.

Despite a thorough and vigorous search of the car interior, there was no marijuana found inside the car (Hr'g Tr. 63:10–12 [“Q: You search the interior of the car. You don't find any marijuana, correct? A: Correct”]; 64:2–5 [Q: You search the interior. You don't find any marijuana, correct? A: Like I said, I observed the little bits, but I didn't recover any marijuana, no”]). Nevertheless, PO Brady searched under the hood of the car (Hr'g Tr. 64:14–17) and PO Brennan searched the trunk (Hr'g Tr. 28:1–6).

PO Brennan's testimony on direct was also irreconcilable with his memo book entries:

Q: Did you write in that section in regards to this arrest that, quote, upon inventory [search] multiple lighters, spray used to cover up scent of marijuana and a fanny pack in the trunk with marijuana residue found? Did you write that?

A: Yes.

Q: Did you write that because it's true?

A: Yes.

(Hr'g Tr. 74:11–17).

Thus, the Blunt Effects spray—allegedly observed at the car stop's inception, in the center console, and purportedly relied upon by these officers as grounds for believing that the car contained large quantities of marijuana justifying a search of the trunk—was actually found in the trunk only after defendant's arrest.

Based on the foregoing discrepancies, this Court finds PO Brennan's testimony incredible as a matter of law.

### CONCLUSIONS OF LAW

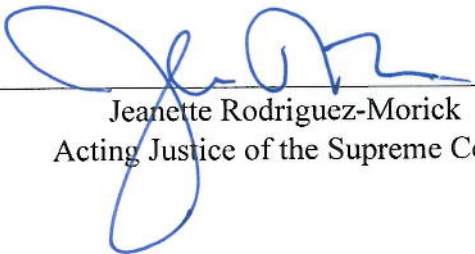
Even if this Court were to credit PO Brennan's testimony—and it does not—a recently decided First Department case, *People v Ponder*, 195 AD3d 123 (1st Dept 2021), would still require suppression here.

The central issue in the *Ponder* case was whether an odor of marijuana emanating from a car justified a search of that car's trunk when only a small amount of marijuana, consistent with personal use, was found inside the car. The First Department, explicitly overturning its own precedent—*People v Valette* (88 AD3d 461 [1st Dept 2011], *lv denied* 18 NY3d 887 [2012]) and *People v Mena* (87 AD3d 946 [1st Dept 2011] *lv denied* 18 NY3d 860 [2011])—held that it does not: “the odor of marijuana, together with a de minimis amount of marijuana found in the ... vehicle, [does] not furnish the requisite probable cause to search the trunk of defendant's vehicle and [] there [is] no factual nexus between the possession of an amount of marijuana consistent with personal consumption and a search for contraband in the trunk of the vehicle” (*Ponder*, 195 AD3d at 123).

If a marijuana odor emanating from a car coupled with a small amount of marijuana found inside the car was insufficient to legally ground a search of that car's trunk as in *Ponder*, then it follows that a marijuana odor emanating from a car coupled only with purported marijuana ashes, as here, provides insufficient grounds to justify a search of the car trunk. Consequently, the gun found therein, and the statements made by defendant thereafter (*see Dunaway v New York*, 442 US 200 [1979]), are suppressed.

This constitutes the decision of the Court.

Dated: June 23, 2021  
Bronx, New York



---

Jeanette Rodriguez-Morick  
Acting Justice of the Supreme Court